IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Plaintiff in Error,

vs.

SPOKANE INTERSTATE FAIR ASSOCIATION,
Defendant in Error.

No. 4639

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division

REPLY BRIEF OF PLAINTIFF IN ERROR

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The plans made, and the methods adopted, by the robber for the purpose of obtaining the money and removing same, without detection, is of no importance to a decision of this case, except that it establishes that, the preparations were made long prior to the policy period, which fact is admitted in Defendant in Error's brief. Such prior preparations throw no light, whatsoever, upon the material question, whether there is evidence sufficient to make a *prima facie* case that entrance to the safe, the subject of the insurance, was effected "by actual force and violence of which force and violence there shall be visible marks upon such safe or vault by tools, explosives, chemicals or electricity," except, to a certain extent, to negative that there was such force and violence. However the robbery may have been accomplished, these preparations were necessary.

Defendant in Error intimates that since Plaintiff in Error did not challenge the sufficiency of the evidence, until after all evidence had been presented, that it conceded that Defendant in Error had made a *prima facie* case. Not so. A challenge to the evidence, when Defendant in Error rested would, under the law, have had to be considered in the light of the record as it appeared, after all the evidence had been presented. Plaintiff in Error desired before presenting the challenge, that its affirmative evidence showing that the steel shavings

were not present at the time the robbery was discovered, should be before the court. The failure to make the challenge when Defendant in Error's rested, was due solely to this.

It is suggested that the transcript bears upon its face evidence that the testimony was either badly reported or badly abstracted. The bill of exceptions was settled after service thereof on Defendant in Error. Amendments were proposed by Defendant in Error to the bill. (Tr. 151.) If the bill did not correctly show the testimony, it is now too late for Defendant in Error to complain. However, it does show the testimony, but there is an error in the printed transcript at page 120. This is no fault of ours, but is the error of the printer. Since the mistake is not, in any sense, that of Plaintiff in Error, we fell we are justified in calling attention to the correct language, which is as follows:

> "I think the dust would have settled below the surface that he would have touched with his fingers. I have never examined this tray since for finger prints. I couldn't tell whether it would be full of finger prints unless I would make a careful examination. The probability is pretty good for finger prints."

Defendant in Error says (brief 7) "the safe door, lock plug and dial rim were not disturbed from that time until the time of the burglary involved in this case." There is not a particle of evidence to

sustain this statement. It is stated (brief 9) that "one could pass at night as many times as one pleased out to the race track, the shrubbery, and through the fence by gates or loose boards, without fear of detection." This is not a correct statement. There were, during that time, numerous fair employees and watchmen all over the grounds during all hours of the night. By care and good luck one might have removed the money in that way without detection. A suggestion (brief 12) "that the vault door was sprung" is somewhat misleading. This was not a discovery made at that time, since the vault door had been in that condition a long time. The statement (brief 14) that the steel shavings were discovered due to a flashlight being turned upon them, is not accurate. These steel shavings were first discovered by Chief of Police Turner and Officer Hudson, while they were standing several feet away, and there was no flashlight being used at the time they made the discovery. The suggestion (brief 14) that "a skilled yeggman (probably there were two or three on the job)" planned and consummated the robbery, is purely a speculation. There was nothing about the affair that at all indicated that there was a skilled yeggman connected with it. The preparation of the hole in the grandstand and in the auditor's room, the oil and adhesive tape, and the removal of the screw in the vault door present no evidence pointing to a "skilled yeggman." These were things that would have been done by any reasonably intelli-

gent person, who was intending to rob the safe at the time in question. The statement (brief 18) that the vault door combination "could be easily picked by an expert, who ought to get it in an hour's time easily" is not supported by the record. Evidence to this effect was received based upon an erroneous assumption of facts, namely, that the combination was set on numbers of 5, 10 or multiples thereof. It developed later that the assumption was not founded on the facts (Tr. 100, 101, 102, 103) and this evidence was withdrawn from the jury. (Tr. 103.) The quotation from the bill of exceptions (brief 20) was from an earlier part of the testimony of the witness Corey. He later admitted that there was no evidence that the plug had been drilled out, nor that the hole was not true. He testified that the hole showed no evidence of a second drill having gone through.

I.

Defendant in Error (brief 21) italicized what it claims is Plaintiff in Error's theory as follows: "(1) The evidence is as consistent with the theory that the safe was entered without force and violence as it is with the theory that force and violence were employed. When the evidence presents two theories, upon one of which the Defendant would be liable, and upon the other he would not, there can be no recovery, for the jury will not be permitted to adopt one theory rather than the other." Plaintiff in Er-

ror has advanced no such argument, nor is that its theory. The contention made in the opening brief was that there were no circumstances proven, which would legally permit an inference to be drawn that entrance was effected by actual force and violence, nor that there were any visible marks made upon the safe by the one so entering; that in fact, all of the circumstances proven, negatived that any such entry was made; that to permit the case to go to the jury, and to return a verdict favorable to Defendant in Error, was to permit a recovery based solely upon guess, speculation and surmise without anything whatever appearing, which would lead to that result.

There is not, in this case, any evidence, which would permit an inference that entrance was effected in a manner so as to create a liability under the policy. As stated in the opening brief, at page 24, there were no circumstances proven, which bore upon this point, except that the hole was drilled by Larson in August, 1922, and a tapered steel plug inserted, and that the plug was not in the hole nineteen days after the robbery.

It is not necessary that Plaintiff in Error should formulate any theory as to who took the money, nor as to the details connected with its taking. The burden of proof is on Defendant in Error, and it is required to present evidence, which will make a

prima facie case of a right to recover. There is no burden on Plaintiff in Error to explain the disappearance of the plug, nor the presence of the shavings. The burden is with Defendant in Error, and must continue with it. Nor is there anything in the transcript as to the standing of the officers of the Fair Association, nor the different employees, which is discussed at page 22, nor is it true that the ones who scattered the steel shavings subsequent to the discovery of the robbery, committed a crime. They could scatter the shavings as they chose, or they could remove the steel plug, and would be guilty of no offense whatsoever. If they did these things for the purpose of making a case against Plaintiff in Error, their act was dishonest, but not criminal.

Whatever the correct rule is as to the probative force of circumstances to sustain a necessary inference—and the courts have expressed themselves differently on the subject—yet all agree that the circumstances must be of such a nature as to reasonably justify the inference sought to be drawn; that verdicts cannot be tolerated, where the only foundation to sustain them is guess, speculation, surmise and conjecture; that the possibility that a thing may have occurred in a certain way is not sufficient.

The case of Travelers Insurance Company v. McConkey, 127 U. S. 661 (32 L. Ed. 308) which Defendant in Error says is on all fours with the case at bar, does not even remotely bear upon the ques-

tion. All that case decides is that in a suit on an accident insurance policy, there is a presumption against suicide and against murder, and that where the policy provides for direct and positive proof that the death was accidental, that this was supplied by the proven fact that the death was the result of a pistol shot, and the presumption against suicide and murder. The quotation from this case, at page 29, simply was to the point that, notwithstanding the presumption against suicide and murder, that there was such evidence to justify an inference that the death was due to either suicide or murder.

The case of U. S. F. & G. Co. v. Blum, 270 Fed. 946, is of a similar nature. Plaintiff in Error has never disputed that a case may be made by circumstantial evidence, and that the circumstances may be of such a nature as to justify an inference necessary to establish a material fact, but it does not follow from this that a fact may be found from circumstances, which do not justify the inference required. No court will permit a recovery where the inference sought to be drawn is one of pure guess and speculation. Fidelity & Casualty Co. v. Bank, 142 Pac. (Okla.) 312, cited by Defendant in Error, clearly shows the distinction. In that case, the door was closed and locked with a time lock. There was evidence so closed, the safe could not be opened in any manner, except by the use of tools and explosives, before the time lock had run to a point

permitting it to open; that there were scratches or marks on the knob or dial of the safe, and that the safe could be opened by the use of blows from a heavy instrument. There was here, therefore, proof that the safe could not be opened at the time when the loss occurred by the use of the combination, or in any other method, except by force, and there were visible marks on the safe, and there was evidence that the safe could be opened by blows when the time lock was on. In other words there was evidence that the safe could only be opened by force and violence at the time in question, the further fact that during this time it was opened, and there were present visible marks.

Defendant in Error says (brief 33) "Any argument here must be based upon mutilated evidence; mutilated by passing through the understanding and the reproduction of court reporter, abstractor and printer." Again we suggest that the bill of exceptions has been settled by the District Judge, who certifies, "that said bill of exceptions conforms to the truth, and contains all the matters and facts material in the proceedings heretofore occuring in the cause and not already a part of the record therein and necessary for the review of this cause by the Circuit Court of Appeals." The certificate further shows that amendments were proposed by Defendant in Error. Plaintiff in Error has brought the record to this court in the proper

way, to have the questions under discussion reviewed. It must be accepted that the bill of exceptions contains all that it should and presents the question properly before this court. Defendant in Error cannot escape the force of the record by a suggestion that possibly there was other evidence. There was no other evidence. The question is before this court as clearly and fully as before the lower court. The difficulty with Defendant in Error is the weakness of its case. As admitted above, the official printer has omitted a few immaterial words at page 120 of the transcript. The transcript, as certified by the clerk of the District Court, is on file with the clerk of this court, and the error of the printer appears. Plaintiff in Error had no control over the printing of the transcript.

It is suggested (brief 36 and 37) that there were more shavings about the safe on the 24th than the morning after the burglary, since Corey testified that some shavings fell out from the dial rim when he removed it. We have dealt with this fully in the opening brief. Corey's testimony shows most conclusively that there could be no shavings under this dial rim, as the result of a previous boring of the hole, or of the plug, unless they were placed there after the new dial rim was obtained and put in place. Nor could they be lodged in the drilled hole, since after the plug was drilled into and then pulled out, no shavings from the drilling would get

into the hole, and if any shavings, under any conditions, got into the drilled hole, the court will notice by examination that this drilled hole is bored on an angle downward. It is not necessary that we should prove how these shavings came to be placed around the safe after the robbery, and before September 24th. The fact remains that they were. Nor is there any burden on Plaintiff in Error to establish why they were placed there, or by whom. The material fact is that they were not present on the morning of September 5th.

Defendant in Error states (brief 42) that there are but two inferences, which can be drawn. (1) That the burglary was committed by a skillful yeggman, and that he drilled out the plug which Larson had put in, and in that manner learned the combination. (2) That the burglary was committed by officers or employees of Plaintiff, who knew the combination of the safe. Neither statement is accurate. If the robbery was committed by a yeggman, it would not follow in any sense that such a yeggman learned the combination through the drilled hole. In fact there would be nothing suggesting that it was learned in that manner. We have dealt with this fully in the opening brief. Nor is it a fact that if the burglary was not committed by a yeggman, that it was committed by officers or employees of Defendant in Error. Given the knowledge of the combination of the vault and the safe,

any fairly intelligent person, who desired to take the risk, could have accomplished the act just as effectively as it was done. Anyone with any intelligence knew that a means of getting into the auditor's office would have to be devised, so as to avoid detection. There was nothing in the carpenter work or other things done, that pointed to an expert yeggman. They were simply the things that were necessary, if there was to be any hope of avoiding discovery. One thing alone was essential, and that was that the one, who entered through these doors, which had been cut, and went into the vault, on the night of September 4th, should know that the preparation, which had been made, had not been discovered. Whether this was someone connected with the Fair Association, a professional yeggman or an ordinary individual, he would have been crazy to have made the entrance without knowing that the preparations made by him had not been discovered.

It is suggested (brief 44) that an acceptance of our theory "entails acceptance of the idea that some officer or employee of the fair, who knew the combination of the safe door, unlocked it." This does not follow at all. The transcript discloses that there were at least eight people, who knew the combination. The extent to which these eight people had communicated the combination is not known. To what extent, if at all, the combination may have been learned through someone getting knowledge

thereof, when the safe door was left open by Larson or by others, or through watching the combination worked, or otherwise, is not known. Suffice to say, that the one, who took the money knew the combination of the vault door, and entered the vault through the manipulation of the combination on that door, and did likewise in the case of the safe door. There is no pretense that knowledge of the combination of the vault door was obtained through any force or violence. Again we repeat there is no burden on Plaintiff in Error to place the blame for this robbery, nor are we attempting to do so, nor are we attempting to accuse anyone. Plaintiff in Error is standing squarely upon the proposition that a *prima facie* case has not been made, warranting a recovery on the policy. The burden to make a *prima facie* case was Defendant in Error's. Plaintiff in Error does, it is true, have some opinions on these different points, but it is neither necessary, nor would it be proper to express them.

II.

The suggestion (brief 46) that the purpose, of the provision in the policy that there should be visible marks of force and violence was "to restrict liability to burglary," is not sound. There are other most important reasons why the requirement of visible marks of force and violence is most important to the insurer. We will discuss this more fully later.

III.

Some suggestion is made (brief 48) as to the request made by Defendant in Error for the policy of insurance. There is no claim that the policy is not the one agreed upon between the parties, and the policy in suit was the only one, which Plaintiff in Error agreed to write, or did write, so far as appears from the transcript. The coverage apparently satisfied Defendant in Error, since it was accepted, and is the one sued on here.

IV.

Under this point (brief 48) Defendant in Error suggests that the fact that entrance was effected to the safe by the manipulation of the combination is of no importance, if knowledge of the combination had been obtained by force and violence, and that the force and violence was the proximate cause. This case does not involve any question of proximate cause, and if it did, the authorities cited would be against Defendant in Error, since they would tend to show that the alleged burglary antedated the policy period. The question here involved is the determination of the rights of the parties under a written contract. By such contract, (the policy of insurance) liability only accrued if entrance was effected to the safe by actual force and violence of which there should be visible marks thereof upon the safe made by tools, explosives, chemicals or

electricity. By the subsequent provision, that a liability should not exist if entrance was effected by opening the door of the safe, by the manipulation of any lock.

The insurer was relieved absolutely from liability if entrance was effected in that manner. There is nothing ambiguous or uncertain about the contract. Simpler language could not have been well employed. Its meaning is perfectly clear. First, there could be no liability, unless the force and violence were used. Second, irrespective of whether force or violence was used, there would be no liability, if the door was opened through manipulation of the combination lock. There might have been all manners of force and violence used, and all manner of visible marks evidencing such force and violence, but if the final act of opening the safe door was effected through the manipulation of the combination lock, under the plain words of the contract, there is no liability.

Defendant in Error says (brief 52): "By one part of the policy, Defendant is made liable if entry is effected by force and violence. By another part Defendant is exempted from liability if the safe was entered by manipulation of the lock. Which provision governs when, as here, both manipulation and force and violence have played a part in effecting the entrance." The answer is perfectly obvious.

Notwithstanding the force and violence, if any were used, nevertheless, in the final analysis entrance was effected by the manipulation of the combination lock, and as plainly as words can express it, the policy prohibits a recovery.

It is suggested (brief 53 and 54) that the sole purpose of the provision against liability where entrance was effected by manipulation of the lock, was to avoid liability caused by mere thievery. This is not, in any sense, correct, and the suggestion will be further discussed under the next head.

V.

ANY FORCE AND VIOLENCE EXERTED UPON THE SAFE AND ANY VISIBLE MARKS THEREON, WERE EXERTED AND MADE PRIOR TO THE POLICY PERIOD.

This point, if the lower court's construction of the policy, was erroneous, is absolutely decisive of this case, and it must follow that Defendant in Error has no right of action whatsoever. Defendant in Error, in its brief at several places, has conceded what is undoubtedly the fact, that if there was any force or any visible marks made on the safe, it was at a time prior to the policy period. If the lower court's construction of the policy was erroneous, then judgment should have been ordered in favor of Plaintiff in Error.

Defendant in Error first concedes that possibly if the first clause of the policy stood alone, the construction adopted by the lower court, was erroneous. So "at least there is nothing in that paragraph which expressly negates the idea that to warrant recovery it is necessary to show that the loss and everything leading up to it occurred during the policy period." It then proceeds to refer to the fourth paragraph, and suggests that by that paragraph "that idea is negated, and it is clearly expressed that to establish a right to recover it need only be shown that loss occurred during the policy period." Defendant in Error's argument on this point is certainly obscure. A very erroneous construction is made of that paragraph. That paragraph does not say that the policy "covers any loss, which occurs during the policy period," nor is there language in the paragraph which would, under any possible construction, lead to that conclusion. We italicized in the opening brief the word "aforesaid" appearing in this paragraph 4, and we called attention to what was referred to when the words "loss" and "damage" were used. Defendant in Error has not seen fit to notice these material words in the policy. To repeat, the first paragraph of the policy relates to "loss by burglary." The second paragraph of the policy is "to indemnify the insured for all damage (except by fire) to such safe or vault, and to the property contained therein." Therefore, in paragraph 4, when the word "loss" is used, it refers to

the loss described in the first paragraph of the policy, and where the word "damage" is used, it refers to the coverage in the second paragraph of the policy. The language of this paragraph reads, "This agreement shall apply only to loss or damage *as aforesaid* occurring within the policy period defined in Item 4." Item 4 describes the policy period as commencing August 31, 1924 at noon. If words could be employed to express more clearly the intention that the "loss" as defined in paragraph 1 must occur within the policy period, we do not know how it would be done without employing many useless words. Loss as defined in paragraph 1 consists of the abstraction of the money from the safe by actual force and violence of which force and violence there should be certain marks. There was not a "loss" within the language of the policy, until these things were done, and that loss under paragraph 4, must have occurred within the policy period. The use of the words "as aforesaid" in paragraph 4, refers back to paragraph 1, and makes the construction for which we contend, unquestionably correct. It would be most unreasonable to assume that either the insurer or the insured intended that there should be any coverage of any nature or kind antedating the policy period.

Defendant in Error (brief 48) complains that "a considerable part of the policy is taken up with the exclusion of liability." This is hardly a fair

statement, since we think this policy is unusually plain in its language. Nevertheless, however, Defendant in Error is in one breath criticizing the policy as employing too many words, and in the next is objecting because additional words have not been employed. There should be a possibility that an insurance company could employ words to limit its liability to the extent, which, the premium paid, would justify the risk, and there is no occasion in this case of reading into the policy something that is not there, and ignoring the plain provisions, and of giving to the insured something that was not within its contemplation when the policy was written.

Defendant in Error (brief 60) suggests that there was no reason for requiring that the force and violence exerted, and the visible marks made, should have been within the policy period; that such requirements were only for evidential purposes. Similar suggestions have been made at previous places in Defendant in Error's brief. It is not true that the purpose of these provisions was for "evidential purposes only." A very much greater reason existed for such provisions. They were of the utmost importance for the purpose of limiting the liability. Plaintiff in Error had assumed a liability of $25,000, for the practically nominal consideration of $28.75. For such a consideration necessarily its liability must be decidedly limited. By the policy the money was to be kept in the safe, and its loss must have

occurred after the safe was closed and locked. As further protection to the insurer, it was required that a private watchman should be employed on the premises at all times, when the same were not regularly open for business. The importance of this provision was to reduce the danger of loss. The taking of money from a safe, where the thief can stealthily enter the place, where the safe is located, and quietly turn the combination, and open the safe door, take the money and depart, is decidedly a different condition from one where in order to render the policy liable, the thief must enter, and by the use of tools, explosives, chemicals or electricity force an entrance into the safe, obtain the money and depart. In the one case his movements are practically noiseless, and the money is acquired, and he is gone in a comparatively short time. In the other case, the explosion and use of the tools, makes a great noise, and instead of being but a comparatively short time at his task, he probably occupies hours. The watchman constantly on duty, and the other employees in and around the office, and the fair grounds, might fail to discover the attempted burglary, where the entrance was effected by the combination route, but there would be scarcely a possibility that the entrance could have been effected by force and violence and by the use of tools, explosives, chemicals and electricity without the noise having been heard, which would lead to discovery with the result that the money would not have been lost, and the added

time taken would greatly have increased the probability that the robber would be discovered. The auditor's room was brilliantly illuminated, and watchmen were going back into the auditor's room to the lavatory all through the night (Tr. 66). It was of the utmost importance to the insurer, for the purpose of decreasing its liability, that these things should occur within the policy period. It was of no protection to the insurer that the entrance should be effected by force and violence, if this force and violence might occur prior to the policy period. Such force and violence would not be discovered or noticed, and in any event it would be of no benefit as to a liability thereafter assumed by the insurer. Defendant in Error suggests that "the surrounding circumstances were such that no successful burglary could be perpetrated, unless preparation therefor were made before the beginning of the fair." If this were true, this was of the utmost importance to the insurer. It would be justified, for the small premium, in assuming the very large liability due to such situation, if its liability was limited as provided by the policy.

That such a policy as this is not construed, so as to create a liability for thievery, or by entering with the combination, where such combination has been obtained by force or violence, such as forcibly taking it away from the one having the combination, or compelling such person to open the safe, or to com-

municate the combination, is decided by the following cases:

Maryland Casualty Co. v. Ballard County Bank, 120 S. W. (Ky.) 301;

Rosenthal v. American Bonding Co., 100 N. E. (N. Y.) 716 (46 L. R. A. N. S. 561);

United Springs Co. v. Preferred Accident Ins. Co., 161 N. Y. S. 309.

The evidence was insufficient to permit a recovery, and for the other reasons given, judgment should be ordered in favor of Plaintiff in Error.

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